

**DOCKET FILE COPY ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Examination of Exclusivity and Frequency )

Assignment Policies of the Private Land )

Mobile Services )

PR Docket No. 92-235

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**OPPOSITION**

The Personal Communications Industry Association ("PCIA"), through counsel, hereby respectfully submits its Opposition to the "Petition for Partial Reinstatement of Application Freeze Pending Clarification or Rulemaking" ("Petition"), filed by the Association of Public-Safety Communications Officials International, Inc. ("APCO") with the Chief, Wireless Telecommunications Bureau, on November 5, 1997.<sup>1</sup>

APCO's Petition requests that the Commission institute a freeze on the acceptance of applications for new frequencies in the 470-512 MHz which are 12.5 kHz removed from previously available channels. APCO states that the freeze is necessary "... pending a rule clarification or modification to ensure that public safety entities will continue to have reasonable opportunities to

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<sup>1</sup>Normally, an Opposition to a request for stay or other temporary relief must be filed with seven days after the stay request. 47 C.F.R. §1.45(d). However, APCO failed to serve a copy of the pleading on PCIA. Therefore, PCIA's filing is timely. Further, the provisions of 47 C.F.R. §1.45(d) preclude a filing of a Reply to this Opposition. Omnipoint Corp. v. PECO Energy Company, DA 97-827, 1997 FCC Lexis 2056 (April 18, 1997); Order, CC Docket No. 93-179, 10 FCC Rcd 1979 (1995); Century Southwest Cable Television, 10 FCC Rcd 7334 (Cab.Ser.Bur. 1995); SBC Media Ventures, Inc., 75 RR 2d 639 (Cab.Ser.Bur. 1994); Comcast Cablevision of Tallahassee, Inc., 9 FCC Rcd 2185 (Cab.Ser.Bur. 1994). In fact, at least one Commission Bureau Chief has specifically admonished his staff not to even read such a filing. Comsat Corp., 10 FCC Rcd 894 (Int.Bur. 1994).

obtain the use of 12.5 kHz channels in the band, and that existing public safety users will be adequately protected from interference.”<sup>2</sup>

It is APCO’s position, reflected in this Petition, the “Emergency Petition for Clarification” filed on October 1, 1997, and the letter from Robert M. Gurss, counsel to APCO, to the Chief, Public Safety and Private Wireless Division dated October 31, 1997, that the Commission should “clarify” that the new channels located 12.5 kHz in between existing Public Safety channels in the 450-470 MHz band are to be assigned for Public Safety entities only. Further, APCO requests that the Commission create a rule which “protects current public safety use” from what APCO believes is interference.

## **I. APCO’S PLEADINGS ARE UNAUTHORIZED AND IMPROPER**

### **A. APCO’s Petition Is An Untimely Petition For Reconsideration**

First, APCO’s pleadings are nothing more than untimely Petitions For Reconsideration for the Commission’s action in its Second Report and Order in PR Docket No. 92-235,<sup>3</sup> with regard to its request that the Commission “clarify” that the 12.5 kHz channels interspersed between public safety channels are assigned to public safety. Although APCO claims that these channels “... in theory were placed in the General Category...”,<sup>4</sup> the Commission’s action could not be any more clear. In the Second Report and Order the Commission specifically stated:

We have listed the 470-512 MHz band in each pool rather than divide up the frequencies between the two pools. The Commission already consolidated the various pools in this band into one pool -- the

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<sup>2</sup>Petition at 2.

<sup>3</sup>6 CR 730, 62 FR 18833, 1997 FCC LEXIS 1357 (1997).

<sup>4</sup>Petition at 4.

General Access Pool. Further, unlike our current approach to the other bands, where frequencies are allocated to a specific service or group of services, frequencies in the 470-512 MHz band are available to all eligibles on a first come, first serve basis. Thus it would be impossible to divide these frequencies into different pools.<sup>5</sup>

In contrast, the section of the Second Report and Order cited by APCO on page 4 of its Petition (which is paragraph 16 of the Second Report and Order) is nothing more than the Commission's explanation for creating two pools below 470 MHz. Paragraph 7 of the Second Report and Order specifically states:

The 470-512 MHz band is available for PLMR use in only thirteen cities, and frequencies in this band were originally divided into seven pools. Later, however, the rules were changed to put the spectrum into one General Access Pool.

Nothing in the Second Report and Order changed this allocation. Clearly, APCO's request is a late-filed Petition for Reconsideration and must be dismissed.

**B. APCO's Petition For Stay 47 C.F.R. §1.44**

In its Petition, APCO requests that, should it not be granted its "clarification", that the Commission modify its rules to "make clear" that certain frequencies are reserved for public safety. Section 1.44(e) of the Commission's Rules provides that:

Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

APCO's request for a rule modification as part of its stay Petition violates Section 1.44(e) and must therefore be dismissed. Further, APCO's Petition was submitted to the Chief, Wireless

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<sup>5</sup>Second Report and Order, supra at para. 20.

Telecommunications Bureau, who does not have the authority to make rule changes. Therefore, APCO's Petition also violates Section 1.44(a) of the Commission's Rules, which states that:

Requests requiring action by the Commission shall not be combined in a pleading with requests for action by an administrative law judge or by any person or persons acting pursuant to delegated authority.

As a result, the Commission must dismiss APCO's Petition without consideration, consistent with Section 1.44(d) of the Commission's Rules.

### **C. APCO Has Violated 47 C.F.R. §1.962(g)**

APCO's Petition, and its October 31, 1997 letter to the Chief, Public Safety and Private Wireless Division, complains about an application filed with PCIA, and purports to provide engineering evidence that the requested system would cause interference to an adjacent channel system. However, APCO never served either document on the applicant, ADF Communications.<sup>6</sup> Thus, APCO has failed to permit the applicant a timely opportunity to respond to APCO's filings. Further, APCO's filings do not comply with the Section 1.962(g) requirement that such filings "... shall be supported by affidavit of a person or persons with personal knowledge thereof".

These significant breaches of the Commission's Rules cannot be ignored. APCO's letter and Petition (at least with regard to this application) must be immediately dismissed without further reconsideration.

## **II. APCO Fails To Meet The Commission's Requirements For A Stay**

Section 1.429(k) of the Commission's Rules provides that:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any

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<sup>6</sup>Nor did APCO serve a copy of either document on PCIA, which APCO claims did not properly fulfill its coordination duties.

rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration.

In order for a stay to be granted, APCO must demonstrate four factors: (1) the likelihood of irreparable injury to the petitioner in the absence of relief; (2) the injury to other parties in the proceeding that might follow if relief is granted; (3) the injury to the public interest that might result if the petition is granted; and (4) the likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal.<sup>7</sup>

APCO has totally failed to address even one of these issues. APCO only speculatively argues that: (1) no spectrum will be available for public safety entities in the 470-512 MHz band; and (2) that interference will be caused without some Commission rule (which is unstated as to what the “rule” should be). On the first point, APCO offers no evidence whatsoever that, even with its proposed “clarification/rule change” that any 12.5 kHz interleaved 470-512 MHz channels are available for any public safety entity to use (based on the engineering criteria that APCO would like to use, according to its representations during several Land Mobile Communications Council meetings). With regard to the need for some interference “rule”, APCO uses a single application to allegedly illustrate some dramatic point. However, since frequency coordinations are merely recommendations, APCO has available to it a licensing process in which it can properly oppose the application, and have its interference concerns properly heard by the Commission. Thus, there is no need for a stay because there is no irreparable harm.

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<sup>7</sup>See, e.g., Storer Communications, Inc., 101 FCC 2d 434 (1985); Washington Area Metropolitan Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. 1958).

APCO's alleged harm is extremely speculative. APCO has supported the interference protocols contained in the Telecommunications Industry Associations Working Group 8.8 Report ("TIA 8.8"). As APCO is aware, these criteria are so stringent that, of the more than 600 applications for 470-512 MHz 12.5 kHz channels, PCIA is aware of only 20 applications at this time that are coordinatable.<sup>8</sup> Thus, without some showing from APCO, it is clear that no spectrum is being "usurped" from public safety users because of the stringent TIA 8.8 protocols, the limited area in which 470-512 MHz frequencies are available and the virtually ubiquitous licensing of that band. As a result few, if any, applications adjacent to public safety by non-public safety applicants will actually be filed with the Commission.

### **III. The Frequency Coordination Process Addresses APCO's Concerns**

APCO's "interference" concerns are misplaced in this Petition. The Commission declined to adopt specific interference procedures in PR Docket No. 92-235 beyond the contour standard. However, any legitimate concern which APCO may have with any application may be addressed in the application review process, through the proper filing of a Petition to Deny, with the appropriate demonstration.

In fact, the ADF application perfectly illustrates the success of the process created by the Commission. PCIA coordinated an application for ADF and at the end of the day "posted" the application on the bulletin board. APCO downloaded the application information, and saw what it believed to be a problem. APCO alerted PCIA as to its concerns, and PCIA is now reviewing the

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<sup>8</sup>This figure includes the ADF application, which PCIA is reviewing to determine whether the proper standards were applied, and excludes applications where the applicant was also the licensee of both "old" channels, thereby eliminating any interference concern.

application.<sup>9</sup> Should PCIA disagree with APCO's analysis, APCO may then seek Commission denial of the application, based upon whatever interference analysis which APCO may produce. Thus, instead of being alarmed by APCO's concern over a single application, the Commission should take comfort that the process which it has created for applications in this band will efficiently assign frequencies.

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<sup>9</sup>PCIA has not yet filed the ADF application with the Commission.


#### **IV. CONCLUSION**

APCO has filed several documents in contravention of the Commission's Rules. Further, APCO provides no basis for its Stay Request, and provides no evidence to the Commission of any harm which would require yet another freeze on a proceeding which has lasted far too long.

WHEREFORE, the premises considered, it is respectfully requested that the Commission DISMISS the "Petition for Partial Reinstatement of Application Freeze Pending Clarification or Rulemaking" filed by APCO in the above-captioned proceeding.

Respectfully submitted,

PERSONAL COMMUNICATIONS  
INDUSTRY ASSOCIATION

By:   
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Date: November 17, 1997



**CERTIFICATE OF SERVICE**

I, Ruth A. Buchanan, a secretary in the law office of Meyer, Faller, Weisman and Rosenberg, P.C. hereby certify that I have on this 17th day of November, 1997 sent via first class mail, postage prepaid, a copy of the foregoing Opposition to the following:

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